No. 86-1739

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Supreme Court of the United States

October Term, 1986

FRANK J. GUARINI, GERALD McCANN, DR. IRWIN SILVERMAN, JOHN M. STILES, NIDIA DAVILA COLON, HARRY BISHARIAN, and WALTER IRWIN,
Petitioners,

-vs-

THE STATE OF NEW YORK, and THE STATE OF NEW JERSEY,
Respondents.

PETITIONERS' REPLY MEMORANDUM

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vs.

THE STATE OF NEW YORK and THE STATE OF NEW JERSEY

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

PETITIONERS' REPLY MEMORANDUM

A. REPLY TO THE STATEMENT OF THE CASE.

The State of New York bases its presentation upon the argument that it has sovereignty over Ellis Island and Liberty Island pursuant to the Compact of 1834 (4 U.S. Stat. 708, ch 126), (granting only limited jurisdiction to New York) and that New York's collection of sales taxes on those islands was permitted by the Compact. Petitioners take issue with these assertions and argued consistently that under the terms of the Compact sovereignty over the islands belongs to the State of New Jersey.

New York would like this Court to believe that petitioners' only cause of action is a direct attack on the validity of the Compact. However, the theory of petitioners' case, as clearly

reflected in Count I of the Complaint, is that the Compact is valid and that the Compact gave sovereignty to New Jersey, not New York. The attack on the validity of the Compact was an alternative theory, pleaded in Count II of the Complaint, and never pressed by petitioners. New York, throughout this entire litigation, has latched onto that alternative theory and attempted to muddle the record by focusing only on this alternative theory.

New York also attempts to create the impression that petitioners did not raise the constitutional issues before the trial court. However, as set forth on pages 12 through 15 of the Petition, the issue was clearly raised before the trial court and as set forth below, the

federal question was properly presented.

B. THE CONSTITUTIONAL ISSUES RAISED IN THE PETITION WERE PROPERLY RAISED BEFORE THE STATE COURTS.

Contrary to the representations contained in the Brief in Opposition filed on behalf of the State of New York, petitioners raised the constitutional issues of wrongful taxation in violation of the Commerce Clause and the Fourteenth Amendment to the Constitution before the trial court.

On pages 12 and 13 of the Petition, petitioners demonstrate that this legal theory was presented and argued before the trial court. Also, as demonstrated on pages 13, 14 and 15 of the Petition, the factual allegations necessary to support those claims were

pleaded. No one contests that these allegations and arguments were presented to the trial court and no one explains why they are inadequate.

Furthermore, this issue was preserved before the appellate courts of the State. Before the Superior Court of New Jersey, Appellate Division, the following argument was presented:

> As set forth in the Statement of Facts above, plaintiffs contend that Liberty and Ellis Islands fall within the taxing sovereignty of the State of New Jersey. New York has been taxing sales transactions on those islands and, at bar, taxed a specific sales transaction of a particular plaintiff. This is a blatant violation of the Commerce Clause of the United States Constitution and the Due Process Clause of the Fourteenth Amendment.

This was followed by a lengthy discussion of McLeod v. J.E. Dilworth

Co., 322 U.S. 327 (1944) and Miller Bros. Co. v. Maryland, 347 U.S. 340 (1950). Before the New Jersey Supreme Court petitioner made the following argument:

> Special reasons exist that support plaintiffs' contention that this petition should be granted pursuant to R. 2:12-4. The State of New York's taxing activity on Ellis and Liberty Islands is in clear violation of the Commerce Clause and the Due Process Clause of the Fourteenth Amendment to the U. S. Constitution because one state may not tax sales transacitons in another state. McLeod v. J.E. Dilworth Co., 322 U.S. 327, 88 L.Ed. 1304 (1944); Miller Bros. Co. v. Maryland, 347 U.S. 340, 98 L.Ed. 744 (1954). Since New Jersey is sovereign over the two islands pursuant to the 1834 Compact, New York is illegally imposing a sales tax on merchandise bought and sold within the sovereign territory of the State of New Jersey.

Despite the fact that these arguments

were raised, none of the state courts chose to pass on the issue.

A determination of whether a federal question is "specially set up or claimed" under 28 U.S.C. sec. 1257(3) is based on state law. Central Union Co. v. Edwardsville, 269 U.S. 190, 194-195 (1925); Pennsylvania R. Co. v. Illinois Brick Co., 297 U.S. 447, 462-63 (1936); Parker v. Illinois, 333 U.S. 571, 574-75 (1948); Michel v. Louisiana, 350 U.S. 91, 93 (1955).

Under the New Jersey Rules of Court, fact pleading is required. N.J. Ct. Rule 4:8-1. It is not necessary or expected in the pleadings in the New Jersey courts to plead the legal theory; rather it is only necessary to plead the facts that give

rise to the claim. Jersey City v. Hague, 18 N.J. 584, 587-588, 115 A. 2d 8 (1955); Locks Laboratories v. Bloomfield Molding Co., 35 N.J. Super. 422, 429, 114 A. 2d 457 (App. Div. 1955). At bar, the facts were pleaded in the Complaint and the constitutional issue was directly raised in the brief.

The federal question must be presented precisely to the state court, and "if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented." New York, ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67 (1928). The Court has also phrased the rule in the following manner: "Our jurisdiction does not depend on citation to book and

verse." Eddings v. Oklahoma, 455 U.S. 104, 113-114 n. 9 (1982). By citing the case of McLeod v. J.E. Dilworth Co., 322 U.S. 327 (1944) petitioners drew into question the specific federal provision that is the subject of the case, i.e., violation of the Commerce Clause by imposition of a sales tax in another State. This is a specific argument. Under 28 U.S.C., sec. 1257(3), exercise of state authority contrary to federal law is a valid basis for this Court's exercise of jurisdiction. Cf. Diamond National Corp. v. State Board of Equalization, 425 U.S. 268 (1976) (the wrongful levy of State sales tax or exempt federal instrumentality).

C. THE LOWER COURT'S RULING THAT THIS SUIT WAS BARRED BY SOVEREIGN IMMUNITY AND COMITY WAS BASED ON FEDERAL, CONSTITUTIONAL CONSIDERATIONS.

New Jersey's opposing brief makes the argument that the lower courts primarily relied on State law in dismissing the case. While this may constitute vigorous advocacy, it does not fully and accurately disclose the holdings below.

The trial court's ruling on the issue of sovereign immunity, was based on an interpretation of Nevada v. Hall, 440 U.S. 410 (1979). The trial court specifically held that one state could claim sovereign immunity in the jurisdiction of the state courts of a sister state. This ruling was not based on the state laws of New York or New Jersey, but rather on the trial court's interpretation of the majority opinion

and heavy reliance on the dissents in Nevada v. Hall, supra.

Similarly the trial court's determination on the issue of comity was intertwined with the trial court's theory that there was a federal principle suggested in Nevada v. Hall that bars this lawsuit.

However, such a determination is in fact contrary to federal law. The State courts of New Jersey cannot simply decline to hear a challenge to State action when that challenge is based on federal constitutional grounds. General Oil Co. v. Cain, 209 U.S. 211, 228 (1908) explained that denial of review of a constitutional question on State jurisdictional grounds can still be reviewed by the Supreme Court:

> "It being then the right of a party to be protected against a law which violates a constitutional right, whether by its terms or the manner of its enforcement, it is manifest that a decision which denies such protection gives effect to the law, and the decision is reviewable by this court."

Respondents' suggestion that petitioner Colon should attempt to apply for a refund in New York does not provide petitioner with an adequate remedy. Petitioner Colon seeks to enjoin the wrongful taxation, not just a refund, which is all New York has to offer. A refund alone is clearly inadequate. See Brinkerhoff-Faris Trust & Savings Company v. Hill, 281 U.S. 673, 678-679 (1930). Also, the wrongful taxation physically occurred within the territory of the State of New Jersey. Petitioner should not be required to travel to a different state

to enforce her rights.

In sum, the state courts of New Jersey erred in declining to hear these issues on the grounds of sovereign immunity or on any grounds.

D. THE QUESTION OF STANDING BEFORE THIS COURT IS A MATTER THAT MUST BE DETERMINED INDEPENDENTLY ON THE BASIS OF FEDERAL LAW.

This Court must bring its own independent judgment to the question of standing. Cramp v. Board of Public Instruction, 368 U.S. 278 (1961). The obligation of state courts to enforce federal rights further obligates the state courts to recognize the standing of plaintiffs that rises to the level of federal standing. Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 526 (1959).

Petitioner Colon is challenging

the actual collection of a sales tax from her within New Jersey pursuant to the law of New York. As argued in the petition, this constitutes standing under federal law.

The issue of which State is sovereign over Ellis Island and Liberty Island under the terms of the Compact of 1834 is an issue that must be resolved to determine if the taxation is unconstitutional. This issue is clearly drawn into issue by the direct injury to petitioner Colon, i.e., the tax collected from her. Because of the direct connection, petitioner should be permitted to litigate this issue, as she should be permitted to litigate any and all issues within the direct scope of her standing.

E. CONCLUSION.

For the reasons stated above and in the petition, it is respectfully submitted that substantial issues have been submitted for review and that this petition for certiorari should be granted.

Respectfully submitted,

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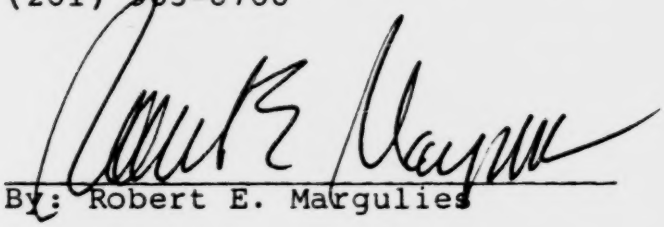

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